Council, [1899] 2 Q. B. 72; *Halliday* v. *Telephone Co.*, [1899] 2 Q. B. 392; *The Snark*, [1899] P. D. 74. And those who thus interfere, though lawfully, with the public's superior right to the use of the way, may well be held to this increased liability. But in other cases, where the act is one which the employer himself from a lack of the requisite skill could not perform, it is surely unjust to hold him liable for the negligence of a contractor, in the selection of whom he has used due diligence. On the introduction of the independent contractor exception, it appeared to be of considerable extent, but the tendency in many jurisdictions is greatly to qualify it, and place it more and more in line with the rules governing master and servant. As the doctrine does not seem to have outlived its usefulness, it is satisfactory to note that the weight of authority, in this country at least, is still against the principal case.

MARRIAGE CONTRACTS AND THE STATUTE OF FRAUDS. — Mutual promises to marry have been generally treated by the courts as subject to the same rules as ordinary business contracts. But, in a recent Maryland case, it was held that the section of the Statute of Frauds forbidding action to be brought on any agreement, not to be performed within one year, unless evidenced by a written agreement, does not include marriage contracts. *Lewis* v. *Tapman*, 44 Atl. Rep. 459 (Md.). The grounds for the decision were, first, that in 1676, when the Statute of Frauds was passed, it being unsettled that an action could be maintained at common law on marriage agreements, it is not legitimate to infer that parliament intended to include such contracts, and, secondly, that, since the contract affects the very basis of society, it should not be massed with other contracts under the general head of "any agreement."

In the seventeenth century, marriage itself having been under the sole cognizance of the ecclesiastical courts for five hundred years, there was considerable dispute as to whether anything so closely akin to it as the contract to marry should come under common law jurisdiction. An action on such a contract, however, was allowed in 1639, *Stretch* v. *Parker*, Rolle, Abr. 22, and again in 1672, *Holcroft* v. *Dickenson*, 1 Cart. 233. In 1676, therefore, when the statute was passed, had parliament intended to exclude such contracts, it seems that the intention would have been clearly expressed. Further, as the clause of the statute regarding agreements in consideration of marriage was held in 1679 to include the marriage contract, *Philpot* v. *Wolcott*, Skinner, 24, an interpretation later overruled, it appears that the courts did not then regard the marriage agreement as excluded by parliament. Nor can a better justification be found in any essential difference in nature. That it is unusual and unnatural to find exact written evidence of marriage promises, may be an argument for expressly excepting them from the statute; but on the other hand this usual lack of exact evidence makes such contracts most likely to be subject to the very fraud, perjury, or half unconscious misstatement, after the lapse of a considerable time, that the statute was constructed to prevent. To bring the contract into court is to treat it as a business agreement, and it is, therefore, not unfair to insist on the same evidence that is required in all business agreements.

The point has apparently never been decided in England. In America it is generally held that the marriage contract is within the statute. *Derby* v. *Phelps*, 2 N. H. 515; *Nichols* v. *Weaver*, 7 Kan. 373; *Ullman*

v. *Meyer*, 10 Fed. 241 (Cir. Ct., N. Y.). In New York and Illinois the contrary view has prevailed, in the one state, because the local statute refers only to "transactions affecting personal property," *Brick* v. *Gannar*, 36 Hun, 52; and in the other because the contract was regarded as "continuing," and so beyond the statute's provisions. *Blackburn* v. *Mann*, 85 Ill. 222. The distinction drawn in the principal case, therefore, does not seem to be justifiable.

PART PERFORMAMCE OF A PAROL CONTRACT TO CONVEY LAND. — It is a general rule of equity that, in order to take a parol contract for the conveyance of land out of the Statute of Frauds, there must be such a part performance by the plaintiff as to make it a fraud upon him if the contract be not enforced. If adequate compensation can be had in money damages, he is left to his action of quasi-contract. Yet, where the plaintiff has altered his position in such a way that no pecuniary payment can make up for the loss incurred, equity will decree specific performance, on the ground that it will not suffer the Statute of Frauds to be made an instrument of injustice. Although the mere payment of the purchase-money, therefore, is insufficient, if the purchaser has taken possession in pursuance of the oral agreement, the seller can be compelled to grant a conveyance of the property on the ground that otherwise the plaintiff would suffer an irreparable injury.

Whether the same rule should ever be applied where the performance has been the giving of personal services is a question of some difficulty. In a late case the defendant's intestate, while suffering from an offensive disease, made an oral agreement to convey land to the plaintiff in consideration of care during the rest of his life. The plaintiff, who had duly performed her part of the contract, obtained a decree for specific performance. *Lothrop* v. *Marble*, 81 N. W. Rep. 885 (S. D.). This decision is in accord with the doctrine generally accepted in America. *Rhodes* v. *Rhodes*, 3 Sandf. Ch. 279; *Davison* v. *Davison*, 13 N. J. Eq. 246. The English rule is that specific performance will be decreed only where the act of part performance is of such a nature as to point exclusively to a contract like that set up; hence personal services are not sufficient, for they might have been rendered equally well in the expectation of pecuniary reward. *Maddison* v. *Alderson*, 8 App. Cas. 467. Although this distinction seems unsatisfactory, the English view is supportable on the broader ground that such services may in fact be adequately compensated in money damages. Where a prospective purchaser has entered into possession of land, not only has he acquired a sentimental interest in the property itself, but he has also made various expenditures for the enjoyment of his ownership, many of which are of no value to the defendant. The plaintiff is a loser, therefore, unless he can obtain specific performance; for it is the gain of the defendant, and not the plaintiff's outlay, which is the basis of an action of quasi-contract. In the matter of nursing an invalid, however, the defendant has received the benefit of all the sacrifice and expenditure of the plaintiff, and thus the full amount can be recovered in quasi-contract. The granting of this form of equitable relief against the Statute of Frauds, being in the nature of judicial legislation, should not be extended beyond the bounds of strict necessity. The wisdom of the American view, therefore, in regard to contracts of personal service, may well be questioned.